COMMERCIAL UNION ASSURANCE (M) SDN. BHD.

v.

NG CHEK HUNG & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-97-1995]
20 MARCH 1997

CIVIL PROCEDURE: *Appeal - Fact, findings of - Whether appellate Court should interfere - Rationale - Advantages of trial Judge - Hearing and seeing witnesses - Whether appellate Court is in position to come to a clear conclusion that trial Judge was plainly wrong - Whether appellate Court should defer to views expressed by trial Judge on credibility of the witnesses*

INSURANCE: *Fire insurance - Proof of loss - Unvalued policy - Whether a question of fact on the evidence*

EVIDENCE: *Statement - Prior consistent statement - Evidence Act 1950, s. 157 - Weight of such statement - Whether a confirmation of the weakest kind - Whether can make firm testimony that suffers from infirmity*

The appellant, an insurance company, had issued two policies covering certain premises and goods belonging to the respondents. The policy in respect of the 1st respondent ('the 1st policy') was valid from 9 June 1984 to 9 June 1985 and the sums insured were RM120,000 for the building and RM30,000 for the household effects. The policy in respect of the 2nd respondent ('the 2nd policy') was valid from 16 July 1983 to 16 July 1985 and the sum insured was RM150,000 for the stock-in-trade. On 11 October 1984, the sums insured for the 1st policy were increased from RM120,000 to RM150,000 in respect of the building and from RM30,000 to RM50,000 in respect of the household effects. The value of the 2nd policy was also increased, ie, from RM150,000 to RM250,000. On 30 November 1984, the building, the household effects, and the stock-in-trade were completely destroyed in a fire. The respondents then commenced an action (consolidated) against the appellant for the sums insured under the two policies. At the hearing of the respondents' action, two of their neighbours ('the witnesses') gave evidence for the appellant. It was alleged that the respondents had secreted away the household effects shortly before the fire, and that there was an ulterior motive behind the increases in the values of the policies. Thus, the appellant repudiated liability on the grounds of fraud and the inability of the respondents to adduce evidence of their alleged losses.

The trail Judge rejected the appellant's defence and entered judgment for the respondents for the sums insured. The appellant appealed to the instant Court contending that: (i) there was no real judicial appreciation of the evidence of the neighbours; and (ii) the trial Judge had failed to realise that the policies were unvalued and, therefore, it was incumbent on the respondents to prove their actual losses.

Held:
Per Gopal Sri Ram JCA

[1] Bereft of the advantages which the trial Judge had of hearing and seeing the witnesses, the instant Court was in no position to come to a clear conclusion that the trial Judge was plainly wrong. Consequently, the instant Court must defer to the views expressed by the trial Judge in respect of the credibility of the witnesses. There is no clearer statement reflecting the duty of an appellate Court in a case in which findings of fact are asked to be reviewed than the pronouncement of Lord Shaw in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 36, p. 36.

[2] In a case, such as the instant one, where the insurance policy is unvalued, it is a question of fact on the evidence whether the loss has been proved to the satisfaction of the trier of primary facts to whom the law has entrusted the duty to assess the evidence.

[3] Although s. 157 of the Evidence Act 1950 allows a previous consistent statement to be used in support of the testimony of a witness, it is confirmation of the weakest kind. Repetition, though it be made a hundred times over, cannot make firm testimony that suffers from infirmity.

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Rayuan - Fakta, keputusan mengenainya - Samada Mahkamah rayuan seharusnya mencampuri - Rasional - Kelebihan Hakim perbicaraan - Mendengar dan melihat saksi-saksi - Samada Mahkamah rayuan berada dalam kedudukan untuk mencapai keputusan bahawa Hakim perbicaraan jelas salah - Samada Mahkamah rayuan seharusnya menurut pandangan yang dinyatakan oleh Hakim perbicaraan mengenai keboleh-percayaan saksi-saksi*

INSURANS: *Insurans kebakaran - Bukti kerugian - Polisi tidak dinilai - Samada suatu persoalan fakta mengenai keterangan*

KETERANGAN: *Pernyataan - Pernyataan konsisten yang terdahulu - Akta Keterangan 1950 s. 157 - Nilai pernyataan yang sedemikian - Samada suatu pengesahan yang terlalu lemah - Samada boleh mengukuhkan testimoni yang lemah*

Perayu, sebuah syarikat insurans, telah mengeluarkan dua polisi yang melindungi beberapa premis dan barangan yang tertentu kepunyaan responden. Polis berhubung dengan responden pertama ('polisi pertama') sah daripada 9 Jun 1984 hingga 9 Jun 1985 dan jumlah yang diinsuranskan adalah RM120,000 bagi bangunan dan RM30,000 bagi barangan rumah. Polisi berhubung dengan responden ke2 ('polisi ke2') sah daripada 16 Julai 1983 hingga 16 Julai 1985 dan jumlah yang diinsuranskan adalah RM150,000 bagi stok niaga. Pada 11 Oktober 1984, jumlah yang diinsuranskan bagi polisi pertama telah dipertingkatkan daripada RM120,000 kepada RM150,000 bagi bangunan dan daripada RM30,000 kepada RM50,000 bagi barangan rumah. Nilai polisi ke2 telah juga dipertingkatkan, iaitu daripada RM150,000 kepada RM250,000. Pada 30 November 1984, bangunan, barangan rumah dan stok niaga musnah sama sekali dalam satu kebakaran. Responden-responden kemudiannya telah memulakan satu tindakan (disatukan) terhadap perayu untuk mendapatkan jumlah yang telah diinsuranskan di bawah kedua-dua polisi. Di perbicaraan tindakan-tindakan responden, dua daripada jiran mereka ('saksi-saksi tersebut') telah memberi keterangan bagi pihak perayu. Adalah dikatakan bahawa responden telah dengan diam-diam melarikan barangan rumah sejurus sebelum kebakaran itu, dan bahawa terdapat motif yang tersembunyi di sebalik kenaikan nilai polisi-polisi itu. Dengan itu, perayu telah menolak tanggungan atas alasan fraud dan ketidak-upayaan responden untuk mengemukakan keterangan mengenai kerugian mereka yang dikatakan itu. Hakim perbicaraan telah menolak pembelaan perayu dan telah memasukkan penghakiman memihak kepada responden bagi jumlah yang diinsuranskan. Perayu telah merayu kepada Mahkamah ini, menegaskan bahawa: (i) tidak terdapat penilaian kehakiman yang sebenarnya terhadap keterangan jiran-jiran; dan (ii) Hakim perbicaraan telah gagal menyedari bahawa polisi-polisi tersebut tidak dinilaikan dan, dengan itu ianya wajib bagi responden membuktikan kerugian mereka yang sebenarnya.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tanpa kelebihan yang dipunyai oleh Hakim perbicaraan untuk mendengar dan melihat saksi-saksi, Mahkamah ini tidak berada dalam kedudukan untuk mencapai keputusan yang nyata bahawa Hakim perbicaraan itu jelasnya salah. Akibatnya, Mahkamah ini haruslah menurut pandangan yang dinyatakan oleh Hakim perbicaraan berhubung dengan kebolehpercayaan

saksi-saksi tersebut. Tidak terdapat pernyataan yang lebih jelas untuk membayangkan tugas sebuah Mahkamah rayuan dalam suatu kes di mana keputusan fakta diminta untuk dikaji semula lebih daripada pengumuman Lord Shaw dalam *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 36, p. 36.

[2] Dalam sesebuah kes, seperti kes ini, di mana polisi insurans tidak dirnilai, ianya merupakan persoalan fakta berdasarkan keterangan samada kerugian telah dibuktikan menurut kepuasan pihak yang membicarakan fakta-fakta utama, kepada siapa undang-undang telah mengamanahkan tugas bagi menilai keterangan.

[3] Walaupun s. 157 Akta Keterangan 1950 telah membenarkan pernyataan konsisten yang dahulu digunakan bagi menyokong testimoni seorang saksi, ianya adalah pengesahan yang paling lemah. Pengulangan, sekalipun beratus kali, tidak boleh menjadikan testimoni yang telah mengalami kelemahan, menjadi lebih kukuh.

[Rayuan ditolak.]

Cases referred to:
Mohamed Ali v. Public Prosecutor [1962] MLJ 230 ***(cit)***
Clarke v. Edinburgh Tramways Co. [1919] SC (HL) 35 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 157

[Appeal from High Court Malaya, Kuala Lumpur; Suit No: C 5187/1985]

For the appellant - Porres Royan (Romesh Abraham & Teng Chong Moi with him); M/s. Shook Lin & Bok
For the respondent - Leong Yeen San; M/s. Low Hop Bing, Koh Kong & Assoc.

JUDGMENT

Gopal Sri Ram JCA:

These appeals are against the decision of the High Court entering judgment for the respondents; in the sum of RM200,000 in favour of the first respondent and in the sum of RM250,000 in favour of the second respondent. The claims arose out of damage caused to the premises and goods of the respondents in a fire which occurred at about 3.30 a.m. on 30 November 1984. The premises and goods in question were insured with the appellant insurer company under two policies of insurance. The first policy was issued on 9 June 1984. It was valid until 9 June 1985. At the date of its issue, the sum assured was RM120,000 for the building and RM30,000 for household effects. The policy

in respect of the second respondent (the second policy) was issued on 16 July 1983 and expressed to be valid until 16 July 1985. It was in respect of stock in trade which was housed within the building in question. That stock in trade was valued at RM150,000 for the purpose of the second policy.

On 11 October 1984, that is to say, about four months after the first policy was issued, the amount insured under the first policy was increased. In respect of the building, it was increased from RM120,000 to RM150,000. In respect of the household effects, it was increased from RM30,000 to RM50,000. Simultaneously, the second policy was also increased in value from RM150,000 to RM250,000.

In the fire which occurred, to which we adverted a moment ago, the building, the household effects and the stock in trade were completely destroyed. On that there is no dispute.

Suspicion for the fire naturally fell upon the respondents. Police investigations were conducted and culminated in the two respondents being charged at the Taiping Sessions Court under s. 436 of the Penal Code. At that trial, two witnesses gave evidence. They were the respondents' neighbours. They were both taxi drivers. I will allude to their evidence later when I come to deal with the assessment made by the learned Judge of their testimony.

At the close of the prosecution's case, the learned Sessions Court Judge acquitted both the respondents without calling upon them to enter their defence. An appeal was lodged against this decision, but later discontinued.

In the actions brought by the respondents against the appellant, they claimed for the sums insured under the respective policies. For completeness, I state that the actions had been commenced before the institution of criminal proceedings and were consolidated. The consolidated actions were heard before the High Court over several days in 1993 and mid 1994, that is to say, about ten years after the fire. Both respondents gave evidence. For the defendants, the two neighbours of whom I spoke earlier in the judgment also gave evidence.

It was suggested to the respondents under cross-examination that they had secreted away household and other goods from the premises shortly before the fire. These suggestions were denied by both respondents. A suggestion was also made that there had been an ulterior motive for the increase in the values of the respective insurance policies. However, each respondent gave an explanation, which I propose not to dwell upon, for making the increase. It is common ground between the parties that an insurance agent, Mr. Teo Cheng Chai, negotiated both policies. He also inspected the premises and the contents before the increase were effected. Unfortunately, he could not be traced and

could not be called as a witness by either side. The appellant, in resisting the claim, relied primarily on two grounds. It was contended that the appellant was not liable because there had been fraud on the part of the respondents in making the claim. The fraudulent intent relied on was based upon the alleged removal of goods and the close proximity between the increases in the value of the respective policies and the fire.

As I have said, the two neighbours gave evidence for the appellant. Each had given a statement to the adjuster who had been subsequently employed by the appellant to investigate the claim. Each was cross-examined vigorously. In the case of the first neighbour (DW 2), he was confronted with the evidence he had given before the Taiping Sessions Court which was materially different from that which he gave in examination in chief. His explanation for the inconsistency may be quite confidently described as feeble. There were also contradictions between his evidence and that of the other neighbour (DW 3). The learned Judge, after assessing all this evidence, came to the conclusion that there no fraud had been practised by the respondents and accordingly, repelled the defence mounted on that ground.

The second defence advanced by the appellant was also rejected by the learned Judge. It related to the fact that the respondents had been unable to produce to the appellant satisfactory evidence in proof of the alleged loss that each had suffered. Some documents had been given. But most of the material asked for by the appellant had perished in the fire. The learned Judge accepted that explanation. Since the fire had taken place close to the date when the premises and contents were last inspected, the learned Judge, no doubt applying the law of averages, chose to enter judgment for the sums insured.

The present appeals are directed against these findings. Before us, Mr. Royan renewed, on behalf of the appellant, the defences advanced in the Court below. In support of his appeal, he identified two broad areas of criticism where he said that the learned Judge had gone wrong. His first complaint was that there was no real judicial appreciation of the evidence of DW 2 and DW 3, in consequence of which the true value of their evidence was overlooked by the learned Judge.

The second ground of complaint was that the learned Judge failed to realise that the policies in question were unvalued and that it was therefore incumbent on the respondents to prove their actual loss.

Mr. Royan has taken us meticulously through the evidence. He has with his usual care, advanced his arguments in support of the credibility of the two witnesses, DW 2 and DW 3. He has also drawn our attention to the

consistency of the evidence in chief of each of these witnesses and the statements which they had given respectively to the appellant's adjuster.

I pause to say that while s. 157 of the Evidence Act 1950 allows such previous consistent statement to be used to support the testimony of a witness, it is confirmation of the weakest kind. Repetition though it be made a hundred times over cannot make firm testimony that suffers from infirmity (See *Mohamed Ali v. Public Prosecutor* [1962] MLJ 230).

On the other hand, the learned Judge noticed and took into account discrepancies in and between the evidence of DW 2 and DW 3. This he was certainly entitled to do. The totality of Mr. Royan's attack against the learned Judge's finding against the first ground is really based on judicial appreciation of evidence to which the audio visual advantage rule applies. The complaints made by Mr. Royan are, I think, sufficiently met by the following passage in the speech of Lord Shaw in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 at p. 36:

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

I must confess my own inability to locate a clearer statement reflecting the duty of an appellate Court in a case where findings of fact are asked to be reviewed. For my part, I would, with great respect, follow the example of

Lord Shaw and ask myself the same question – am I sitting here, bereft of the advantages which the trial Judge had, in a position to say whether DW 2 and DW 3 were telling the truth?

I have little difficulty in answering that question in the negative. I would therefore defer to the views expressed by the learned trial Judge about the credibility of the two witnesses. For this reason, I would reject the arguments advanced by Mr. Royan in support of the first ground.

I now turn to the second ground. As pointed out in the course of argument by my learned brother NH Chan JCA, the close proximity in time between the inspection by Mr. Teo Cheng Chai and the fire, taken together with the destruction of supportive documents, well entitled the learned Judge to conclude that the loss as claimed had been established. I entirely associate myself with the sentiments expressed by my learned brother. I too, am of like mind.

In cases such as this, where the policy is unvalued, it is a question of fact on the evidence whether the loss has been proved to the satisfaction of the trier of primary facts to whom law has entrusted the duty to assess the evidence. For this reason, I would once again defer to the assessment of the learned Judge. I am entirely satisfied that there is sufficient material in the record provided to us in these appeals to support the trial Judge's findings.

In the circumstances, I am of the opinion that these appeals are without merit. I would dismiss them and make those orders which are usually consequent upon a dismissal.

NH Chan JCA:

I agree.

Abdul Malek Ahmad JCA:

I concur.

Reported by Alex KC Lee